

Date: 20061004

Docket: A-509-05

Citation: 2006 FCA 320

**CORAM: NOËL J.A.
SHARLOW J.A.
MALONE J.A.**

BETWEEN:

Flint Hills Resources, Ltd.

Appellant

and

National Energy Board, Enbridge Pipelines Inc., Canadian Association of Petroleum Producers, BP Canada Energy Company, Devon Canada Corporation, EnCana Corporation, Imperial Oil, Marathon Ashland Petroleum Canada Ltd., Mobil Pipe Line Company, Shell Canada Limited, Suncor Energy Marketing Inc., Terasen Pipelines Inc., TransCanada Keystone Pipelines Ltd. and TransCanada PipeLines Limited

Respondents

Heard at Calgary, Alberta, on October 4, 2006.

Judgment delivered from the Bench at Calgary, Alberta, on October 4, 2006.

REASONS FOR JUDGMENT OF THE COURT BY:

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REASONS FOR JUDGMENT

(Delivered from the Bench at Calgary, Alberta, on October 4, 2006)

MALONE J.A.

I. Introduction

[1] Flint Hills Resources, Ltd (Flint Hills) appeals from a June 2005 decision of the National Energy Board (Board) (RH-1-2005). In its decision, the Board approved two applications made by Enbridge Pipelines Inc. (Enbridge), to increase the tolls it charges crude oil shippers using its Canadian mainline system. The increase would be used to provide US\$100 million of financial

support to upgrade two pipelines located in the United States and known as the Spearhead Pipeline and the Mobil Pipeline. Those upgrades did not require any changes or additions to Enbridge's mainline system in Canada.

[2] Flint Hills is a shipper of crude oil whose volumes represent approximately ten percent of the total amount of crude oil transported on the Enbridge mainline in Canada. That crude oil may be transported to Flint Hills refinery in Minnesota without recourse to either the Spearhead or Mobil pipelines.

[3] During the course of the Board proceedings, Flint Hills made submissions questioning the jurisdiction of the Board to approve the recovery of Enbridge's proposed costs in its annual tolls. On this particular point, the Board stated the following:

Having found that it is prudent for Enbridge to enter into the proposed contractual commitments to provide financial support for the Spearhead and 20" reversal projects, and to incur the associated costs, and that the costs will result in general benefits to the Enbridge system and its shippers, the Board finds it reasonable that the costs be included in the otherwise applicable Enbridge annual revenue requirement and recovered from all shippers based on Enbridge's approved toll design (Board reasons at page 51).

[4] On appeal, it is again the position of Flint Hills that the Board lacks the jurisdiction to have authorized Enbridge to include and recover such costs in its tolls. It argues that although the Board has broad discretion to determine whether proposed tolls would be just and reasonable, it cannot act in excess of its statutory authority when performing that function, and in deciding as it did, the Board exceeded its jurisdiction.

[5] As we understand it, Flint Hills is asking this Court to adopt the following as a principle of law: The Board, in establishing the revenue requirement used to set the toll increase sought by Enbridge in this case, exceeded its jurisdiction when it included in that revenue requirement the cost incurred by Enbridge to finance infrastructure or infrastructure improvements that are not part of the Enbridge undertaking to which the toll relates. Counsel for the appellant explained that this principle is not intended to cast doubt on the notion that the revenue requirement can include costs referred to as “transportation by others”, i.e., the cost incurred by Enbridge in using someone else’s pipeline to move its customers products from the end of one Enbridge pipeline to the beginning of another Enbridge pipeline.

[6] It is also the position of Flint Hills that the Board failed to provide adequate written reasons to explain the basis upon which it would have the statutory authority to authorize the inclusion and recovery of such costs in tolls.

II. Standard of Review

[7] Flint Hills characterizes the Board’s decision as jurisdictional in nature and submits that such a question should be answered on a correctness standard. It cites the Supreme Court of Canada in *ATCO Gas & Pipelines Ltd. v. Alberta (Energy & Utilities Board)*, 2006 SCC 4, for the proposition that jurisdictional questions contain no polycentric considerations and therefore, the expertise of the Board is not engaged when determining the scope of its statutory authority. Flint Hills also notes the weak privative clause found in sections 22 and 23 of the *National Energy Board Act (the Act)*, R.S., 1985, c. N-7.

[8] In view of our conclusion that the appeal should be dismissed, it is not necessary to conduct an extensive standard of review analysis. Even on the most intrusive standard of review (i.e. correctness), it has not been demonstrated that the Board erred in law.

III. Analysis

Issue 1: Jurisdiction

[9] A line of cases in this Court have considered the Board's powers to determine tolling and to interpret provisions of the *Act*, its enabling legislation. For example, in *Trans Mountain Pipe Line Company Ltd. v. National Energy Board et al.*, [1979] 2 F.C. 118 (C.A.), Pratte J.A. stated:

Whether or not tolls are just and reasonable is clearly a question of opinion which, under the Act, must be answered by the Board and not by the Court. The meaning of the words "just and reasonable" in section 52 is obviously a question of law, but that question is very easily resolved since those words are not used in any special technical sense and cannot be said to be obscure and need interpretation. What makes difficulty is the method to be used by the Board and the factors to be considered by it in assessing the justness and reasonableness of tolls. The statute is silent on these questions. In my view, they must be left to the discretion of the Board ...

[10] More recently, Rothstein J.A., then a member of this Court, in *Transcanada Pipelines Ltd. v. Canada (National Energy Board)*, 2004 FCA 149 at paragraph 31, specifically noted that the Board is not required to adopt any specific methodology in determining tolls. As long as the tolls charged are just and reasonable in accordance with section 59 of the *Act*, then the Board will be afforded broad discretion to determine tolls.

[11] Under section 59, Parliament has given the Board the power to make orders setting tolls in relation to pipelines. The term “toll” is defined in the Act as including any toll for the transportation, transmission and delivery of a commodity through a pipeline. The power to set tolls is circumscribed by sections 62 and 67, that is any toll allowed by the Board must be just and reasonable and not discriminatory. Beyond this, the Board must stay within the confines of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982 (U.K.)*, 1982, c. 11, by ensuring the tolls it establishes do not become taxes and that they do not somehow stray into provincial jurisdiction. So long as the Board meets the requirements of the *Act* and the *Constitution Act*, it has discharged its jurisdictional burden.

[12] When regard is had to the statutory context and background, there is, in our view, no basis for the proposition that in setting tolls under Part IV, the Board is barred from taking into account costs incurred by pipeline operators on the basis that they serve to improve infrastructure belonging others. This is sufficient to dispose of the first argument.

Issue 2: Adequacy of Reasons

[13] We turn then to the adequacy of the Board’s reasons. The specific passage setting out the Board’s opinion as to its jurisdiction states:

After a careful consideration of the legal submissions of parties, the Board does not find persuasive the argument of Flint Hills that the Board lacks authority to approve the recovery of the proposed costs in tolls. Having found that the costs will be reasonably and prudently incurred in relation to the operation of the Canadian system, it would be inconsistent and contrary to well established rate-making principles for the Board to find that the same costs could not be recovered from the users of that system (Board’s reasons at page 51).

[14] Flint Hills submits that this one paragraph dismissal of its jurisdictional argument is entirely without any supporting reasoning or analysis.

[15] The practical test as to whether reasons are adequate is whether there are deficiencies in the reasons that would prevent meaningful appellate review (see *R. v. Sheppard*, [2002] 1 S.C.R. 869 at paragraph 29). In past cases involving issues of jurisdiction, this Court has stated that the parties must be able to clearly discern from the reasons whether the tribunal exercised its jurisdiction under the relevant statutory provision (see Rothstein J.A. in *Novell Canada Ltd. v. Canada (Minister of Public Works)*, (2000) 257 N.R. 179 at paragraphs 3, 10 and 15).

[16] The Board's decision in this case accords with its broad tolling powers that allow it to take into account considerations that further the interests of the Canadian energy sector. In our analysis, there is sufficient information in the written reasons and the submissions and evidence referred to by the Board, to ascertain the reasoning of the Board and to allow meaningful appellate review.

IV. Conclusion

[17] The appeal will be dismissed with costs.

“B. Malone”

J.A